IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.397 OF 2007
Along with
CIVIL APPLICATIONNO.493 of 2007

1. Smt Mathubai Mahipati Kadu
and ors. Appellants
Vs

2. Baban Ananta Konde, Respondents

Mr P.K.Hushing, for the appellants.
Mr S.M.Sabrad for respondent no.1.

CORAM : D.B.BHOSALE,J.
DATED : 18th SEPT., 2007
P.C.:

1. Heard learned counsel for the parties. Admit. By consent,taken up for hearing forthwith.

2. The appellants/defendants have impugned the judgment and order passed by the first appellate court dated 15.4.2006, by which it has allowed the appeal and decreed a suit filed by the repsondents-plaintiffs for possession and removal of flour mill machinery from the suit premises. The trial Court had dismissed the suit vide its judgment and order dated 27.6.2003 holding that the respondent-plaintiff had failed to prove his valid title over the suit property. While dismissing the suit, the trial Court had recorded a finding that the defendants had also failed to prove that they owned and possessed the suit property referable to valid title. The respondent-plaintiff had challenged the

judgment of the trial Court dated 27.6.2003 in the first appeal bearing Civil Appeal No.64 of 2003. The appellate court had framed the following points for determination.

1) Is it proved that the appellant no.2 is having title to the suit property?

2) Whether the issue of title is barred by the principles of res-judicata?

3) Whether the appellant no.2/plaintiff no.2 is entitled for possession of the suit property?

Point nos 2 and 3 were answered in the affirmative and in view thereof the first point was answered as redundant.

3. It appears that earlier the appellants-defendants had filed a Regular Civil Suit No.103 of 1994 against the respondent-plaintiff for permanent injunction in respect of the very same suit property. In that suit, the trial Court had framed the following issues and answered them in the affirmative.

Issues	Findings
1) Whether the plaintiff proves his exclusive ownership and possession over the floor mills in dispute?	Yes.
2)Whether he proves obstruction to his possession at the hands	

of the defendants? Yes.

4. While decreeing that suit the defendant, that is, the plaintiff in the present suit, was restrained from obstructing the possession of the appellants-defendants, that is, the plaintiffs in that suit, over the suit property without following the due process of law. I perused the judgment dated 25.11.1997 in Regular Civil Suit No.103 of 1994. Upon perusal of the judgment it is clear that there is no positive finding in respect of the title of the suit property either in favour of the defendants or of the plaintiffs. As a matter of fact in paragraph 9 of the judgment dated 25.11.1997 the appellate court has observed that "the plaintiff’s long standing possession over the suit property and the flour mill required to be protected till the dispute about the title is being settled by the competent authority." Learned counsel appearing for the parties have also agreed that there is no such finding recorded in the earlier suit. In the present appeal, the first appellate court, however, answered issue no.2 in the affirmative holding that the issue of title is barred by the principles of res judicata. This finding is ex-facie wrong and deserves to be set aside. The learned counsel for the parties have fairly stated that I need not record long reasons for allowing this appeal. In the circumstances, I am

satisfied that the following order would meet the ends of justice:

(i) The impugned judgment and order dated 15.4.2006 is quashed and set aside. The matter is remanded to the first appellate court to decide all the issues on merits in accordance with law and after taking into consideration the evidence on record afresh as expeditiously as possible and preferably within a period of six months from the date of receipt of this order. The defendants are restrained from creating third party rights or parting with possession during pendency of the appeal and for a period of four weeks thereafter. The second appeal is accordingly allowed, with no order as to costs.

(D.B.BHOSALE,J.)